

## Securities and Exchange Commission Issues Emergency Order Prohibiting Short Sales of Securities of Financial Institutions

September 19, 2008

On September 18, 2008, the Securities and Exchange Commission (the "Commission") issued an emergency order<sup>1</sup> (the "Order"), temporarily prohibiting any person from effecting a short sale<sup>2</sup> in the publicly traded securities<sup>3</sup> of financial firms identified by the Commission in Appendix A to the Order<sup>4</sup> (the "Included Financial Firms"). The Order was effective immediately upon its issuance and terminates at 11:59 p.m. EDT on October 2, 2008, unless further extended by the Commission. The Order was issued by the Commission to protect the integrity and quality of the securities market and strengthen investor confidence.

The Order provides three exceptions to short sales of publicly traded securities of an Included Financial Firm:

- short sales in such securities made by registered market makers, block positioners, or other market makers obligated to quote in the over-the-counter market as part of bona fide market making in such security;

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<sup>1</sup> See SEC Release No. 34-58592 (September 18, 2008).

<sup>2</sup> A short sale is generally a sale of a security by an investor who does not actually own such security. In an ordinary short sale, the short seller borrows shares of stock and sells them, with the expectation the loan will be settled by buying a corresponding amount of shares of stock in the market at a later date, which shares will be delivered to the share lender.

<sup>3</sup> The Commission's staff has orally confirmed that preferred securities, convertible securities and debt securities are not covered by the Order.

<sup>4</sup> This list includes banks, insurance companies, and securities firms identified by the Commission's Standard Industrial Classification Codes 6000, 6011, 6020-22, 6025, 6030, 6035-36, 6111, 6140, 6144, 6200, 6210-11, 6231, 6282, 6305, 6310-11, 6320-21, 6324, 6330-31, 6350-51, 6360-61, 6712, and 6719, and is subject to amendment by the Commission. We understand that the Commission is expected to expand the list by amendment and that the New York Stock Exchange and the NASDAQ Stock Market are coordinating with the Commission's Staff in order to identify additional institutions to be added to the list.

- short sales in such securities made as a result of automatic exercise or assignment of an equity option held prior to effectiveness of the Order due to expiration of the option; and
- short sales in such securities that occur prior to 11:59 p.m. on September 19, 2008 by an options market-maker as part of bona fide market making and hedging activity related directly to bona fide market making in derivatives on such securities.

It is currently expected that the Commission will provide additional guidance on whether these exceptions cover short sales associated with hedging of over-the-counter derivatives.

On September 19, 2008, the Commission's staff recommended that the Commission modify the Order to extend, for the life of the Order, the exception for hedging activities by exchange and over-the-counter market-makers in derivatives on the securities covered by the Order.

The Commission also issued two other emergency orders: the first order relaxes certain timing and volume conditions of Rule 10b-18 under the Securities Exchange Act of 1934 (which Rule provides a safe harbor for issuer repurchases of its capital stock)<sup>5</sup>; and the second order requires certain institutional investment managers to report information concerning daily short sales of securities<sup>6</sup>.

Finally, the Commission announced an expansion of its ongoing investigation into market manipulation in respect of securities of financial institutions.<sup>7</sup>

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<sup>5</sup> See SEC Release No. 34-58588 (September 18, 2008).

<sup>6</sup> See SEC Release No. 34-58591 (September 18, 2008).

<sup>7</sup> See SEC Press Release 2008-214 (September 19, 2008).